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No. 414

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

CATHERINE S. WEINSTEIN, Administratrix of the Estate of ALBERT WEINSTEIN, DECEASED,
Appellant in Appeal No. 12042.

vs.

UNITED STATES,
Appellee.

JOSEPH J. ALESSANDRINE,
Appellant in Appeal No. 12043,

vs.

UNITED STATES,
Appellee.

APPEALS FROM THE ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

[redacted] Appendix for Appellants

VINIKOOR AND CRIDEN,
505 Finance Building,
Philadelphia 2, Pennsylvania,
Attorneys for Appellants.

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DOCKET ENTRIES IN APPEAL NO. 12042.

(Catherine S. Weinstein, Admx., Appellant.)

1955

August 18 Complaint filed.

August 18 Summons executed.

September 1 Summons returned "on 8-23-55 served" and filed.

September 1 Amended complaint filed.

October 13 Defendant's Notice of taking Depositions of Catherine S. Weinstein filed.

October 24 Defendant's motion to dismiss, etc. filed.

1956

May 8 Plaintiff's Motion for Production of Documents filed.

June 4 Argued sur motion to dismiss.

June 11 Order of Court granting Motion to Dismiss filed.
Noted and Mailed 6-12-56.

June 21 Plaintiff's Motion to Vacate and Set Aside Judgment or Dismissal or in the Alternative request for Conclusions of Law, filed.

July 20 Order of Court denying Motion to Vacate and Set Aside Judgment filed.
Noted and Notice mailed 7-23-56.

August 1 Plaintiff's Notice of Appeal filed 8-2-56. Copy to W. White, Esq.

August 1 Clerk's copy of notice to U. S. Court of Appeals filed.

DOCKET ENTRIES IN APPEAL NO. 12043.

(Joseph J. Alessandrine, Appellant.)

1955

September 1 Complaint filed.

September 1 Summons executed.

September 22 Summons returned "On 9-2-55 served United States Attorney" and "On 9-14-55 served by Registered Mail on Attorney General" and filed.

October 14 Defendant's Notice of Taking Depositions of Plaintiff filed.

October 24 Defendant's Motion to Dismiss, etc. filed.

1956

May 8 Plaintiff's Motion for Production of Documents filed (See C. A. #19433).

June 4 Argued sur motion to dismiss, etc. CAV.

June 11 Order of Court granting Motion to Dismiss file (#19433):

Noted and notice mailed 6-12-56).

June 21 Plaintiff's Motion to Vacate and Set Aside Judgment of Dismissal or in the Alternative Request for Conclusions of Law, filed (See #19433).

July 20 Order of Court Denying Motion to Vacate and Set Aside Order dismissing Complaint filed.

Noted and notice mailed 7-23-56.

August 1 Plaintiff's Notice of Appeal filed (Copy to W. White) 8-2-56.

August 1 Clerk's copy of Notice to U. S. Court of Appeals filed.

August 22 Record transmitted to U. S. Court of Appeals.

AMENDED COMPLAINT.

1. Jurisdiction is laid under the act of the 79th Congress, Second Sessions, Page 753, Title IV, 60 Stat. 843 et seq., 28 U. S. C. 1346 (b) et seq., as amended, known as the "Federal Tort Claims Act."

2. Plaintiff is the personal representative of ALBERT WEINSTEIN of 419 Randolph Street, Camden, New Jersey, and was duly appointed Administratrix of his estate on August 12, 1955 in Camden County Surrogate's Court, State of New Jersey.

3. Plaintiff is the widow and mother of decedent's two children, Claire Ann Weinstein and Jeanne Helene Weinstein, aged eight and four respectively.

4. ALBERT WEINSTEIN died as a result of injuries resulting from the "Publicker Explosion" occurring and resulting on May 26-27, 1955, in Philadelphia, Pennsylvania, beginning with the fire and explosion in Building #160 at Delaware Avenue and Bigler Streets, all of which was proximately caused and brought about by the negligence and wrongful acts and conduct both of omission and commission on the part of the Defendant, its agents, servants, employees, operators, and other personnel acting within the scope of their employment, under circumstances where the United States, if a private person, would be liable under the law of the place where such wrongful acts and omissions occurred. Plaintiff charges a large number of Defendant's negligent and wrongful acts and omissions as hereinafter more particularly set forth, continued, occurred, singly and in sequence within the Eastern District of Pennsylvania.

5. Prior to and including May 26-27, 1955, Defendant, by and through its employees, coming within the scope of their employment, supervised and controlled the building known as #160 and caused said building to be locked daily for a period commencing four thirty o'clock P. M. and eight o'clock A. M. of each day, during which time operations in the plant were prohibited.

6. Plaintiff alleges that the Defendant knew or should have known by the exercise of reasonable diligence that the prohibited hours of operation and locked building enforced by the Defendant without proper precautions, warning and regulations, created a highly dangerous condition, i. e. a large accumulation of fumes, vapors, the quality and characteristics of which the Defendant knew or should have known by the exercise of reasonable diligence to be highly and inherently dangerous to persons working in or about the building.

7. The Plaintiff alleges that the Defendant was negligent in failing to take proper precautions for the protection of employees working in and about Building #160.

8. Notwithstanding its special knowledge of the condition created by the prohibited hours of operation and locked building, the Government failed to:

a. Require and promulgate orders and regulations relating to proper ventilation, air space and air circulation.

b. Post watchman and guards for the safety of persons employed in or about Building #160.

c. Exercise that degree of care commensurate with the risk of danger arising from and reasonably to be expected to arise from the large accumulation of vapors of a highly and inherently dangerous inflammable nature which were contained in a congested area amidst chemicals rea-

sonably to be expected to be found in an alcohol denaturing plant and bonded warehouse.

d. To issue specific and direct detailed instructions to its employees relating to safety.

9. Defendant wrongfully failed to require under its regulatory powers that this highly dangerous and hazardous building be so maintained as to secure the highest degree of ventilation, air space and air circulation.

10. Plaintiff notifies Defendant that she will not be confined to the specific negligence and wrongful acts and omissions hereinbefore specified but expects to rely additionally and independently upon the general allegations of wrong, fault, negligence, tortious acts and conduct of the Defendant.

FIRST CAUSE OF ACTION.

All of the allegations of the foregoing paragraphs herein are incorporated by reference as if the same were set forth at length.

11. At the time of the aforesaid accident, Plaintiff's decedent was in good and robust health with prospective advancement and substantial earning capacity.

12. The Decedent left surviving him a wife, CATHERINE S. WEINSTEIN of 619 Randolph Street, Camden, New Jersey, and two children, CLAIRE ANN WEINSTEIN and JEANNE HELENE WEINSTEIN of 619 Randolph Street, Camden, New Jersey, as the only persons entitled to recover damages for his death and on whose behalf this action is brought.

13. By reason of the death of decedent, the Plaintiff has suffered pecuniary loss and has incurred various expenses for funeral and burial.

14. The decedent did not bring an action for his personal injuries during his lifetime, and no other action for the death of the decedent has been commenced against this Defendant, nor has any claim been made against any other governmental agency.

15. By reason of his untimely death, decedent's next of kin were deprived of the support and comfort which they would have received but for the fatal injury, and more particularly the Act of 1855, P. L. 309, as amended, and Pennsylvania Rule of Civil Procedure, No. 2202(a).

WHEREFORE, Plaintiff claims the sum of One Hundred Fifty Thousand ($150,000.00) Dollars as damages upon the said cause of action.

SECOND CAUSE OF ACTION.

All of the allegations of the foregoing paragraphs herein are incorporated by reference as if the same were set forth at length.

16. By reason of the negligence of the Defendant as aforesaid, and the death of ALBERT WEINSTEIN, as herein above described, Plaintiff claims the benefit of the survival statutes of this Commonwealth including the Fiduciaries Act of 1949, P. L. 512, Article VI, Second 601, et seq., and seeks on behalf of his estate the economic value of decedent's life during his life expectancy and the pecuniary loss sustained by his estate.

17. By reason of the untimely death of the said, ALBERT WEINSTEIN, Plaintiff claims, in addition, damages for the psychic value of the expectancy of the life of the decedent which was cut short by reason of the above-described accident.

WHEREFORE, Plaintiff claims of Defendant on behalf of the estate of ALBERT WEINSTEIN, the sum of One Hundred Thousand ($100,000.00) Dollars.

/s/ MARTIN VINIKOOR,
VINIKOOR and CRIDEN,
Attorneys for Plaintiff.
By: MARTIN VINIKOOR.

GOVERNMENT'S MOTION TO DISMISS AND IN THE ALTERNATIVE MOTION FOR A MORE SPECIFIC PLEADING.

The Government moves to dismiss the Amended Complaint for the following reasons:

1. The Amended Complaint fails to state a claim against defendant upon which relief can be granted.

2. Case is barred by:

(a) 28 U. S. C. 2680(a);
(b) 28 U. S. C. 2680(c); and
(c) 28 U. S. C. 2680(i).

3. The case must be stricken for the reason that if the United States was a private party it would not be liable.

4. The Government owed no duty (of omission or commission) to the plaintiff or plaintiff's decedent.

5. Plaintiff's decedent assumed the risk and was guilty of contributory negligence.

6. If an negligence existed it was on the part of the Publicker Industries, Inc.

7. The building and/or buildings were under the exclusive control of Publicker Industries, Inc. Plaintiff's decedent was a Publicker employee and, accordingly, entitled to Pennsylvania Workmen's Compensation, precluding recovery under the Federal Tort Claims Act.

8. Plaintiff's Amended Complaint alleges a liability on the ground of "respondeat superior" and yet fatally fails to name the Government agent and/or agents who were negligent.

9. The Court lacks jurisdiction.

In the alternative, the Government moves for a more specific pleading, particularly with reference to paragraphs 8, 10 and 17 of the Amended Complaint.

/s/ W. WILSON WHITE,
United States Attorney.
/s/ G. CLINTON FOGWELL, JR.,
Assistant United States Attorney.

Dated: 10-21-55.

[PLAINTIFFS'] MOTION FOR PRODUCTION UNDER RULE 34.

AND NOW, MAY 8th, 1956, come the Plaintiffs by their Attorney, and move the Court for order under Rule 34, requiring the Defendant to permit the inspection, copying or photostating of the following papers and documents, permission for same having been refused by Defendant:

1. The plat and plans of the premises, building, apparatus and equipment located at Delaware Avenue and Bigler Streets, known as Building #160, Bonded warehouse and Denaturing plant.

2. Reports of the Alcohol Tax Unit of the Federal Bureau of Internal Revenue and/or Publicker Industries, Inc., relating to inspections, report of explosion, etc., including:

a. Form Nos. 1443, 1466f, 1468a-f, 1474, 1476, 1479, 1481 and 1489 for the years 1953, 1954 and 1955.

b. Any claims for remission of tax for losses occurring on the premises relating to the explosion occurring on May 26, 1955 (Forms 1443a, 1443b, 1468a to 1468f inclusive, and 1482).

c. Report of Storekeeper-gauger with respect to such losses as required by 26 C. F. R. 182.700D, and 182.778.

d. Any reports by Assistant Regional Commissioner of the Alcohol Tax Unit as required by 26 C. F. R. 182.700E and 182.778.

e. All inspectors' records for the years 1953, 1954 and 1955, with specific reference to any notice with respect to the condition of the accumulation of fumes in Building #160.

f. Any correspondence between Federal Storekeeper-gaugers, Inspectors, Assistant Regional Commissioners, Regional Commissioners, and Director Alcohol Tax Division and/or Publicker Industries, Inc. with respect to ventilation and the accumulation of fumes in Building #160.

This motion is based upon affidavit hereto attached.

/s/ MARTIN VINIKOOR,
VINIKOOR and CRIDEN,
Attorneys for Plaintiffs.
By: MARTIN VINIKOOR.

Commonwealth of Pennsylvania }
City and County of Philadelphia } ss.

MARTIN VINIKOOR, being duly sworn according to law, deposes and says that he is Of Counsel for the Plaintiffs in the above matter; that Defendant has in its possession the papers and documents requested in the accompanied motion; that the Defendant through its Counsel refused to permit the Plaintiffs to inspect or copy the same and that the above-mentioned items constitute or contain evidence relevant to a matter involved in this action.

/s/ MARTIN VINIKOOR.

Sworn to and subscribed before me this 8 day of May, A. D. 1956.

/s/ GOLDIE LEVIN.

Order Granting Motion to Dismiss
Plaintiffs' Motion to Vacate and Set Aside Judgment

ORDER [GRANTING MOTION TO DISMISS].

AND NOW, to wit, this 11th day of June, A. D. 1956, after hearing the argument and considering the briefs submitted by the parties, it is ORDERED, ADJUDGED and DECREED that the motion to dismiss filed by the United States of America in each of the above entitled actions be and the same is hereby GRANTED.

/s/ J. WELSH,
J.

PLAINTIFFS' MOTION TO VACATE AND SET ASIDE JUDGMENT AND IN THE ALTERNATIVE REQUEST FOR CONCLUSIONS OF LAW.

TO THE HONORABLE JUDGE GEORGE A. WELSH:

The Plaintiffs, in the above action, respectfully move the Court to vacate and set aside the order and judgment of June 11, 1956, dismissing the Complaints entered in these actions for the following reasons:

1. That the Complaints on their face set forth a cause of action based on alleged negligence on the part of the United States Government.

2. The Complaints clearly set forth a triable issue of fact and the Motion to Dismiss should have been overruled and the Plaintiffs afforded an opportunity to present proof.

Order

REQUEST FOR CONCLUSIONS OF LAW.

In the alternative, the Plaintiffs, by their Attorneys, VINIKOOR AND CRIDEN, request the Court to make Conclusions of Law as a method of saving proper legal questions for review.

/s/ HOWARD L. CRIDEN,
VINIKOOR AND CRIDEN,
Attorneys for Plaintiffs.
By: HOWARD L. CRIDEN.

Dated: June 21, 1956.

ORDER.

AND NOW, to wit, this 20th day of July, 1956, the above entitled case having been argued on the pleadings of the Plaintiff and summary motion of Defendant and the court, after due deliberation, having granted the Defendant's motion to dismiss the Complaint,

AND NOW, after motion of VINIKOOR AND CRIDEN, Attorneys for Plaintiff, filed herein on the 21st of June, 1956, to vacate and set aside the order dismissing the Complaint, it is

ORDERED, ADJUDGED and DECREED that the motion to vacate and set aside the judgment is denied; even though the allegations as set forth in the Complaint are accepted as fact and true but the Court, nevertheless, concludes as a matter of law that these facts are insufficient to establish a case upon which the United States Government can be held liable.

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U. S. D. J.